



June 9, 2008

Michael Burke
Green Mountain Power Corp.
163 Acorn Lane
Colchester, VT 05446
and
Robin Stern, Esq.
205 Main Street, Suite 8
Brattleboro, VT 05301

Re: Jurisdictional Opinion #2-254 Green Mountain Power Corporation
Doolittle/Daiello/Tellechea - Vernon

Dear Michael and Robin:

This is a jurisdictional opinion in response to your requests regarding the applicability of Act 250 to a line extension proposed by Green Mountain Power Corporation ("GMP") to serve the Daiello property located off the former Old Stebbins Road in Vernon. As outlined below, there are also plans to serve the Tellechea lot. It is my opinion that the line extension to the Daiello lot requires an Act 250 permit and that further extension to serve the Tellechea lot also requires an Act 250 permit. The facts and analysis which form the basis for this opinion are as follows:

Facts

1. Green Mountain Power ("GMP") has provided information on the proposed utility project, but has not identified the full scope of the project. At this time GMP has provided a plan to provide service to the Daiello house. However, the Petition for Condemnation ¹ (to establish an easement over lands owned by Dale and Brenda Merritt) filed by GMP with the Public Service Board ("PSB") shows there is an identifiable plan to provide service to the lot owned by Dr. Jose Tellechea. In the petition GMP identified the purpose of the condemnation is to provide power to two separate houses, the existing house owned by Steve Daiello and a planned house on the lot owned by Dr. Jose Tellechea. The Petition reads in part:

In July 2007, GMP received an application from Steve Daiello and Dr. Jose Tellechea, on behalf of property owner Doolittle Mountain Lots, Inc.

1. "Petition of Green Mountain Power Corporation pursuant to 30 V.S.A. §§ 110-124 to condemn an easement right in property owned by Dale A. and Brenda J. Merritt in the Town of Vernon" dated January 8, 2008.

("Doolittle"), requesting that GMP provide electric service to a house resided in by Steve Daiello and located on the Doolittle property at the end of a private road. In addition, they seek power for a house that Dr. Tellechea intends to have constructed on the Doolittle property also at the end of the private right-of-way.

2. The Daiello property is part of a larger property which had been owned by Doolittle Mountain Lots Inc. In January 2007 Doolittle Mountain Lots Inc. conveyed parcels to Jose Tellechea (34.42 acres) and Daiello (81.48 acres) and retained a separate parcel (40 acres). These lots are shown on "The Boundary Survey for the Lands of Doolittle Mountain Inc." prepared by SVE Associates dated 3-25-2004 revised 5-7-2004.
3. The jurisdictional opinion request from GMP identifies the sole purpose of the line is to serve the existing home of Steven Daiello, despite the statement in the Petition for Condemnation which identifies the purpose of the line to provide power to two houses.
4. The portion of the line identified by GMP shows a connection from Pole 43 to the Daiello home. The plan (titled Doolittle MTN. and dated 5-14-2008) shows 1,738' overhead and 1,040' underground of line. The line would cross the lands owned by Dale and Brenda Merritt and Joshua and Nicholas Merritt. The line would also be adjacent to lands owned by the State of Vermont and managed by the Department of Fish and Wildlife. The state-owned property is known as the Roaring Brook Wildlife Management Area ("Roaring Brook WMA").
5. The involved property is located in Vernon which has neither zoning nor subdivision regulations. A portion of the underground section of the line would be on the Dale and Brenda Merritt property and the overhead line would cross the Roaring Brook Wildlife Management Area and the Joshua and Nicholas Merritt property.²
6. The proposed line follows the former Old Stebbins Road. A default 20' ROW width (See Natural Resources Board Rule 70 - Utility Line Jurisdiction, Installations and Applications, is generally assumed, however, GMP acknowledges that anchors will "likely need to be set outside of the road right-of way." The plan shows some of these anchors both in the corridor and outside of the corridor designated as part of the project. The plan also designates the

² "Doolittle Mountain Line Extension" plan - Green Mountain Power dated 5-14-2007.

overhead right-of way on the plan's "Key" as 25'.³ Using a 25' right-of-way and counting 1,738' of overhead line (44,450 square feet) and 1,040' of underground line using a default 20' ROW (20,800 square feet), the portion of the project serving the Daiello lot includes 64,250 square feet or 1.47 acres. One acre is 43,560 square feet.

7. The plan does not show the Primary Voltage GMP line needed to reach the property line of the Tellechea lot,⁴ however, the distance from the Daiello lot to the Tellechea lot boundary is approximately 1,938'.
8. One issue in this jurisdictional opinion is whether the underground portion of the line is located on lands which qualify as necessary wildlife habitat. Forest Hammond, Wildlife Biologist for the Vermont Department of Fish and Wildlife, has identified all wooded sections where the proposed overhead and underground lines would be located as necessary wildlife habitat consisting of deer wintering area. The only portion of the route of the proposed line that does not qualify as necessary wildlife habitat is the 604' underground section through the cleared Merritt homestead area and the transmission line clearing. (Personal Communication Forest Hammond).
9. Although not a factor in this analysis, in addition to the deer wintering area, a portion of the overhead line passes through necessary wildlife habitat for the eastern racer snake (*Coluber constrictor*). The eastern racer is a large snake 36-60 inches long which is presently listed as a threatened species in Vermont. The Department of Fish and Wildlife has been studying the snake for the last four years and during that time has located only six individuals. These are the only six eastern racers known to exist in Vermont. (Personal Communication Forest Hammond and Kim Royar District Wildlife Biologists).

³"Petition of Green Mountain Power Corporation pursuant to 30 V.S.A. §§ 110-124 to condemn an easement right in property owned by Dale A. and Brenda J. Merritt in the Town of Vernon" dated January 8, 2008. Page 3. See also Attachment A "Doolittle Mountain Line Extension" plan from Mike Burke Green Mountain Power dated 2-28-2008

⁴ See "The Boundary Survey for the Lands of Doolittle Mountain Inc." prepared by SVE Associates dated 3-25-2004 revised 5-7-2004.

Analysis

The issues relevant to this opinion are:

1. Is there sufficient acreage involved in the project to trigger Act 250 jurisdiction?
2. Is the portion of the line needed to *reach* the Tellechea property reasonably identifiable by the utility now and thus subject to Act 250 jurisdiction?

Natural Resources Board Rule 70 - Utility Line Jurisdiction, Installations and Applications outlines utility line jurisdiction, in part, as follows:

(B) Utility Line Jurisdiction. The construction of improvements for electrical distribution, natural gas distribution, or communication lines and related facilities that are located on rights-of-way, or easements, of more than one acre of land owned or controlled by a person or persons in a municipality without both permanent zoning and subdivisions bylaws. The phrase construction of improvements shall include construction, relocation, extension, and reconstruction.

The rule further outlines how acreage is to be calculated and requires a default 20' right-of-way or the maximum width of the area to be physically altered, whichever is greater as described below:

(1) Acreage shall be calculated by aggregating the total area of all sections of new corridor, including all sections of existing corridor to be substantially changed, which area shall be calculated by multiplying the length of each section by the width of the associated right(s) of way in that section. For the purpose of calculating project acreage, right-of-way width shall be: **twenty (20) feet for electrical distribution lines** or projects involving both electrical and communication lines, ten (10) feet for natural gas distribution lines, ten (10) feet for lines to be used exclusively for communications, or the maximum width of the area to be physically altered, whichever is greater. Jurisdiction will apply if a project exceeds the acreage thresholds set forth above. (Emphasis added).

Underground lines are exempt from Act 250 jurisdiction unless they pass through areas of special import, including areas which qualify as critical wildlife habitat. This exemption is described as follows:

(d) Lines, facilities or portions thereof to be constructed underground shall not be used for acreage calculation, provided that: the underground line or facility is to be reseeded or reforested; no portion of the underground line is located above the elevation of 2,500 feet; and **no portion of the underground line or facility is located in** a rare or irreplaceable natural area, or **land which is or contains a natural resource referred to in 10 V.S.A., §6086(a)(1)(E) (streams), (1)(F) (shorelines), (1)(G) (Class One or Class Two wetlands), (8)(A) (necessary wildlife habitat or endangered species), or (9)(B) (primary agricultural soils).** In addition, a line or facility or portion thereof to be constructed underground in a scenic area shall be used for acreage calculation to the extent that such line or facility will be located on land not already cleared prior to commencement of construction of the line or facility. For purposes of this subparagraph, A scenic area means an area formally designated as scenic by the State of Vermont or the applicable regional or municipal plan. (Emphasis added).

Rule 70 also addresses projects which are to be completed in stages as follows:

(e) In the event that a project is, **or is to be**, completed in stages, all new corridor and all existing corridor to be substantially changed that is involved in the entire project shall be included for the purpose of determining jurisdiction. As used in Rule 70(B), the term “project” shall mean adjacent lines, facilities, **or portions thereof to be constructed in accordance with a plan to achieve one or more objectives identified or reasonably identifiable by the utility at the time construction is commenced.** Other construction, not identified or reasonably identifiable at the time the project is commenced, shall not be considered part of such project. (Emphasis added).

Because a portion of the underground line is located in lands which contain necessary wildlife habitat, pursuant to the rule, *all* of the underground line must be counted. Applying the 25' overhead row shown on the plans and the default row of 20' outlined in the rule for the underground sections, the portion of the proposed line which will serve the Daiello lot exceeds an acre and requires an Act 250 permit.

As outlined in the Petition for Condemnation filed by GMP with the PSB, Steve Daiello and Dr. Jose Tellechea, have requested that “GMP provide electric service to a house resided in by Steve Daiello and located on the Doolittle property at the end of a private road. In addition, they seek power for a house that Dr. Tellechea intends to have constructed on the Doolittle property also at the end of the private right-of way.” This additional portion of line is clearly identifiable, so much so, that GMP included its planned construction as part of its reason for the condemnation of the lands of the Merritts.

The rule does not require that in order to count stages of the plan as part of the project that engineering be completed. The rule only requires that the project stages be "reasonably identifiable" by the utility. The stage of the project to continue the line to the end of Old Stebbins road to serve a house to be built on the Tellechea lot has already been reasonably identified by the utility. GMP has been asked by the landowners for power *for both houses*. GMP, in turn, has asked the PSB to condemn Merritt land to serve houses on both lots. The purpose of Rule 70(e) is clearly to prevent the exemption of portions of projects, which are reasonably identifiable parts of a plan, from Act 250 jurisdiction. Thus, before the line is extended for the Tellechea lot an Act 250 permit amendment must be obtained.

Best regards,

April Hense/s/
April Hensel
District 2 Environmental Coordinator

cc: Certificate of Service

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(A).

Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must attach to the Notice of Appeal the entry fee of \$225.00, payable to the State of Vermont. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Montpelier, VT 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the VRECP.

For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The Environmental Court mailing address is: Environmental Court, 2418 Airport Road, Suite 1, Barre, VT 05641-8701. (Tel: 802-828-1660)

